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## SUPREME COURT OF THE UNITED STATES

DONALD H. GASKINS *v.* KENNETH D. McKELLAR,  
WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 90-7469. Decided June 3, 1991

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS, respecting the denial of the petition for a writ of certiorari.

One of the questions presented in the certiorari petition is whether our *per curiam* decision in *Cage v. Louisiana*, — U. S. — (1990), announced a new rule. This question, however, would only be presented by the record if the instructions in this case contained the same flaw as the instructions in *Cage*. In *Cage*, the jury was instructed that a reasonable doubt “must be a doubt as would give rise to a grave uncertainty. . . .” *Id.*, at —. Because the instructions to the jury in this case did not contain this improper language, the question whether *Cage* announced a new rule is not actually presented here. For this reason, I think the Court has correctly decided not to grant certiorari to review that question.

JUSTICE MARSHALL, dissenting:

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 231 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE BLACKMUN would grant the petition for a writ of certiorari, vacate the judgment and remand the case to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Yates v. Evatt*, 500 U. S. — (1991).

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